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AVOIDING A LANDMINE: A PRACTITIONER'S GUIDE TO DISARMING THE REASONABLY EQUIVALENT VALUE REQUIREMENT OF SECTION 548 OF THE BANKRUPTCY CODE

Section 548 of the Bankruptcy Code¹ enables a trustee in bankruptcy to set aside a foreclosure sale as a fraudulent transfer if a transferor does not receive "reasonably equivalent value."² In light of the vast power this term confers upon a trustee, it is ironic that a clear definition is conspicuously absent from the Bank-

¹ 11 U.S.C. § 548 (1988). Section 548 provides in pertinent part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(2)(A) received less than a *reasonably equivalent value* in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

Id. (emphasis added).

² *Id.*; see, e.g., *Pembroke Dev. Corp. v. Commonwealth Sav. & Loan Ass'n* (*In re Pembroke Dev. Corp.*), 124 B.R. 398, 400 (Bankr. S.D. Fla. 1991) (stating that court must scrutinize all aspects of transaction in determining whether debtor received reasonably equivalent value); *Brown v. Vanguard Holding Corp.*, 119 B.R. 413, 415 (Bankr. S.D.N.Y. 1990) (mem.) (deciding that inadequacy of price alone is insufficient to determine dispositively whether debtor received reasonably equivalent value); *IPI Liberty Village Assocs. v. Spalding Corners Assocs.* (*In re IPI Liberty Village Assocs.*), 92 B.R. 882, 884 (Bankr. W.D. Mo.) (noting that court must compare amount paid with value of property instead of bid price to determine reasonably equivalent value), *aff'd*, 82 B.R. 507 (W.D. Mo. 1987). See generally Robert Burford, Note, *Can Mortgage Foreclosure Sales Really be Fraudulent Conveyances Under § 548(a)(2) of the Bankruptcy Code?*, 22 Hous. L. Rev. 1221, 1245-49 (1985) (explaining Uniform Fraudulent Transfers Act's relation to current reasonably equivalent value standard); William A. Walsh, *In Re Bundles: Finding a New Basis for Determining "Reasonably Equivalent Value" Under Section 548 of the Bankruptcy Code*, 40 DEPAUL L. REV. 175, 178-92 (1990) (discussing evolution of reasonably equivalent value requirement and current problems of interpretation); Robert M. Zinman et al., *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977, 1003-04 (1984) (summarizing historical background behind promulgation of reasonably equivalent value requirement currently in Bankruptcy Code).

ruptcy Code.³ Historically, this omission has proven to be a serious problem, particularly in the area of mortgage foreclosures.⁴

Courts primarily employ four different methods to ascertain whether reasonably equivalent value has been received at a mortgage foreclosure sale.⁵ None of these judicially created ap-

³ See Mark E. Budnitz, *The Duties Imposed by Bankruptcy Courts Upon Mortgagees at Foreclosure Sales: How to Avoid Avoidance Under Section 548*, 46 BUS. LAW. 1183, 1184 (1991) (noting that Bankruptcy Code does not define term "reasonably equivalent value"); Walsh, *supra* note 2, at 177 (maintaining that reasonably equivalent value is difficult to ascertain due to Code's lack of definition); Burford, *supra* note 2, at 1243 (indicating that Bankruptcy Code did not consider issue of reasonably equivalent value); see also Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 378; 1A BANKRUPTCY SERVICE LAWYER'S EDITION § 5D:45 (Timothy E. Travers et al. eds., 1990) [hereinafter BANKRUPTCY SERVICE] (stating that Bankruptcy Code fails to define reasonably equivalent value). See generally 2 BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE § 25.03[3][b][iv] n.35 (1993) (discussing 1984 amendments to section 548 of Bankruptcy Code).

⁴ Numerous cases have grappled with the issue of whether reasonably equivalent value was received at a mortgage foreclosure sale. See, e.g., *Hussey v. Haider (In re Haider)*, 126 B.R. 796, 800 (Bankr. D. Mont. 1991) (finding forced sale for 62% of property's appraised value not reasonably equivalent); *Sims v. Talman Home Mortgage (In re Sims)*, 112 B.R. 259, 262 (Bankr. N.D. Ill. 1990) (avoiding foreclosure sale as fraudulent transfer even though creditor met requirements of state foreclosure law); *Kachanizadeh v. Denlinger (In re Kachanizadeh)*, 108 B.R. 734, 738 (Bankr. C.D. Cal. 1989) (presuming reasonably equivalent value where state foreclosure proceedings were followed); *National Envtl. Sys. v. Long Pond Realty Trust (In re National Envtl. Sys. Corp.)*, 111 B.R. 4, 9 (Bankr. D.N.H. 1989) (determining reasonably equivalent value on case-by-case basis).

⁵ See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203-04 (5th Cir. 1980). The *Durrett* doctrine has been interpreted to mean that reasonably equivalent value has not been achieved and the transfer may be avoided as fraudulent if the consideration received is less than 70% of the property's fair market value. See, e.g., *Cole v. Sovran Mortgage Corp. (In re Cole)*, 81 B.R. 326, 329 (Bankr. E.D. Pa. 1988). The second approach, adopted by the *Madrid* court, creates an irrebuttable presumption of reasonably equivalent value if the transfer is the result of a "non-collusive and regularly-conducted foreclosure sale." See *Lawyer's Title Ins. Corp. v. Madrid (In re Madrid)*, 21 B.R. 424, 427 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197, 1201-02 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984). The third approach, used by the *Bundles* court, adopts a rebuttable presumption that the price received at a foreclosure sale is reasonably equivalent value and suggests that courts examine the totality of circumstances in each case. See *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824 (7th Cir. 1988).

Finally, the last category of cases addressing reasonably equivalent value applies a hybrid approach, which combines portions of the previous three theories. One of the more popular cases espousing this concept was *Lindsay v. Beneficial Reins. Co. (In re Lindsay)*, 98 B.R. 983, 991 (Bankr. S.D. Cal. 1989). The *Lindsay* court used a three-part test to determine whether reasonably equivalent value was received at a mortgage foreclosure sale. *Id.* First, the court considered whether the foreclosure sale was noncollusive and conducted in accordance with state law. *Id.* Second, the court examined the totality of circumstances surrounding the foreclosure sale to determine if commercially reasonable steps were taken to obtain the best price. *Id.* If both of these

proaches, however, provide an adequate definition of reasonably equivalent value.⁶ Given this inadequacy and the judiciary's failure to resolve it,⁷ it is submitted that a myriad of interpretations of the term, each with similar shortcomings, will continue to arise absent a legislative change to section 548.⁸

elements are satisfied, the court deems the purchase price received to be reasonably equivalent value. *Id.* If the sale was not commercially reasonable, the next step is to examine the price actually received at the mortgage foreclosure sale as another factor in determining whether reasonably equivalent value was received. *Id.* The *Lindsay* approach combines the *Madrid* and *Bundles* methods.

⁶ See Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 578 (1987). Proponents of the *Durrett* doctrine argue that it will yield an increase in the proceeds of property sold at a foreclosure sale. *See id.* Increasing the foreclosure price received will result in a more equitable distribution of compensation to the creditors. *See id.* at 577-78; Walsh, *supra* note 2, at 189-92. Advocates of the *Madrid* approach assert that utilizing an irrebuttable presumption based on the procedure followed at a foreclosure sale will establish a market in which foreclosed property can be disposed of rapidly and permanently. *Id.* Supporters of the case-by-case or *Bundles* theory argue that this doctrine is the most equitable because the court examines the facts and circumstances of each particular case. *See id.* at 192-95; *see also* Henry-Luqueer Properties, Inc. v. Mayo (*In re* Henry-Luqueer Properties, Inc.), 145 B.R. 771, 774-75 (Bankr. E.D.N.Y. 1992) (noting courts that prefer flexible case-by-case approach).

The *Lindsay* approach is currently popular as it creates the benefit of a rebuttable presumption of reasonably equivalent value if state foreclosure procedures are followed, yet permits an examination into the facts and circumstances of each particular case. *See, e.g., Haider*, 126 B.R. at 799 (stating that court must examine totality of circumstances); *Brown*, 119 B.R. at 415.

But see Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 CARDOZO L. REV. 581, 589-99 (1987). Opponents of the *Durrett* approach assert that it is too inflexible. *See id.* at 594-95. Fair market value is not considered a sufficient basis for evaluating a foreclosure sale because the risks inherent in the foreclosure process almost invariably result in a lower price than that which would have been received if the property were sold in a fair market. *Id.* at 602; Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State & Federal Objectives*, 71 VA. L. REV. 933, 963 (1985) (arguing that *Durrett* case-by-case analysis fosters uncertainty in finality of foreclosure sales).

Critics of *Madrid* assert that irrebuttably presuming reasonably equivalent value if proper foreclosure procedures are followed unnecessarily prevents inquiry into the facts of each case, thereby resulting in potential inequities. *Id.* at 956-67. Adversaries of *Bundles* argue that examining the facts and circumstances of all cases encourages litigation. Walsh, *supra* note 2, at 194-95.

⁷ *See supra* note 5 (discussing judicial attempts in *Durrett*, *Madrid*, and *Bundles* to define reasonably equivalent value). Furthermore, since the most recent method adopts a hybrid approach combining various elements of already existing methods, *see, e.g., Brown*, 119 B.R. at 415, *Lindsay*, 98 B.R. at 991, the potential exists for an infinite amount of permutations, resulting in judicial solutions with similar character flaws.

⁸ *See supra* notes 3-7 and accompanying text (detailing problem of defining reasonably equivalent value and insufficient judicial responses).

This Note suggests measures which establish a feasible mechanism for ascertaining the meaning of reasonably equivalent value. Part I discusses the policy implications underlying mortgage foreclosure and proposes an amendment to section 548 which clearly defines reasonably equivalent value. Part II presents an examination of the proposed statutory elements, explaining the legal justification behind each one. Part III provides practitioners with a series of suggestions aimed at minimizing the probability that a foreclosure sale will be avoided for failure to provide reasonably equivalent value. Finally, Part IV discusses the Supreme Court's recent grant of certiorari regarding this issue and demonstrates the usefulness of the proposed statutory amendment, regardless of the case's outcome.

I. PROPOSED AMENDMENT TO SECTION 548

A. Policy Implications

A prerequisite to an effective legislative remedy is a fundamental understanding of the policy considerations which underlie our current mortgage foreclosure system.⁹ From a federal perspective, section 548 seeks to maximize recovery for the creditors.¹⁰ Coexisting with this view is the state's interest in provid-

⁹ See 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 60, at 82 (rev. ed. 1940) (identifying Roman law as recognizing and addressing fraudulent conveyance problem); Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109, 110-11 (1931) (stating purposes of Roman fraudulent transfer law similar to reasons for existing law); see also Kennedy, *supra* note 6, at 536 (noting that Statute of 13 Elizabeth is predecessor to modern Anglo-American fraudulent transfer law); Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 16-17 (1919) (summarizing recourse under early English law for creditors who were victims of fraud); Zinman, *supra* note 6, at 583-84 (stating 13 Elizabeth precursor of American fraudulent transfer law as well as *Twyne's Case* bore concept of fraudulent transfer law by denominating "badges of fraud"). See generally Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160 (1991) (analyzing development of bankruptcy law in United States).

¹⁰ See 11 U.S.C. § 548(a)(2)(A) (1988) (enabling court to avoid foreclosure sale as fraudulent transfer if reasonably equivalent value not received); *supra* note 1 (reproducing pertinent part of § 548); see also Ehrlich, *supra* note 6, at 933 (claiming that federal foreclosure laws attempt to maximize creditor recovery); Michael L. Walcott, Comment, *Avoidance of Foreclosure Sales as Fraudulent Transfers Under Section 548(a) of the Bankruptcy Code: An Impetus to Changing State Foreclosure Procedures*, 66 NEB. L. REV. 383, 409-10 (1987) (noting that bankruptcy law allows federal courts to protect interest of debtor); Walsh, *supra* note 2, at 196 (indicating federal government, through Bankruptcy Code, seeks to protect debtor's estate in "economical manner").

ing a liquid market in which creditors may expediently dispose of their security interests.¹¹

1. Investment Risks

Under the existing system, the many variables inherent in the process of mortgage foreclosure sales create a high degree of investment risk.¹² Due to this risk, prospective real estate buyers offer less money for the property, often resulting in highly discounted purchases.¹³ The probability that a trustee will be able to avoid a conveyance as fraudulent increases when bidders tender

¹¹ See Ehrlich, *supra* note 6, at 933 (citing state goal in foreclosure sales as providing mortgagees with forum to sell property quickly and permanently); see also David H. Fishman, *The Foreclosure Sale*, in 3 THE ACREL PAPERS 47, 47-59 (1992) (discussing problems common to most state foreclosure proceedings). *But cf.* 4 COLLIER ON BANKRUPTCY ¶ 541.01 (Lawrence A. King et al. eds., 15th ed. 1993) (arguing that states should adopt UFTA to bring state objectives in line with federal goals). See generally Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195 (1986) (suggesting that state and federal goals may be at odds in area of fraudulent transfers because states have not uniformly adopted UFTA).

¹² See 1 DUNAWAY, *supra* note 3, § 14.04[6][c]. One potential risk for purchasers is the equity of redemption, which enables a mortgagor to pay the foreclosure price and take back the property. *Id.*; see also Corrie M. Anders, *Don't Close Door on Buying Foreclosed Property*, CHI. TRIB., Feb. 23, 1992, at 1M (maintaining that prospective home buyers should consider foreclosed properties sold by Federal Home Loan Mortgage Corporation and Resolution Trust Corporation, but must evaluate high risk involved); Robert J. Bruss, *Risky Business, 'As is,' in Simple English Means 'Buyer Beware'*, CHI. TRIB., Sept. 25, 1992, at C4 (asserting that potential home purchasers should carefully evaluate risk before buying foreclosed property); Shawn G. Kennedy, *For the Long Term Make Sure You Know What You're Buying Experts Say*, CHI. TRIB., Sept. 18, 1992, at D2 (noting that those purchasing foreclosed property may receive tremendous discounts but risk buying real estate in poor physical condition); Anemarie Roketenetz, *Patience, Sweat Equity Needed in Many Foreclosures*, WASH. TIMES, Jan. 29, 1993, at H16 (highlighting that people who have lost everything including their homes sometimes take it out on their house).

¹³ See NAA *Statement Regarding RTC's Premier Commercial Auction in Palm Springs Calif.*, PR Newswire, Nov. 23, 1991, available in DIALOG, File No. 613 (auction sales enable buyers to obtain highly discounted property); Christopher Wood, *Investors Purchase Mortgages to Take Property in Foreclosure*, DENV. BUS. J., June 19, 1992, § 1, at 6 (asserting that buyers can acquire foreclosure property with less competition and at greater discounts); see also Maggie Farley, *Some Great Buys May Turn Sour; Bankruptcy Snarls Revere Condo Sale*, BOSTON GLOBE, June 12, 1992, at 63 (demonstrating high risks that purchasers incur at foreclosure sales); David Johnston, *Real Estate Brokers Say Buyers Beware of Foreclosure Actions*, Gannett News Service, Nov. 4, 1991, available in LEXIS, Nexis Library, Wires File (noting that bidders at foreclosure sale may be better off buying from bank after sale concluded); David Johnston, *Renovating a Run-Down Home Risky, But Can Reap Rewards*, Gannett News Service, Mar. 18, 1991, at 1 (maintaining that foreclosure purchasers may get good buys if willing to do repair work themselves); Kennedy, *supra* note 12 (finding that discounts on distressed property can range from 20 to 40%).

small consideration because reasonably equivalent value will not be deemed received.¹⁴ Amending section 548 to provide a method to determine reasonably equivalent value¹⁵ would assist prospective purchasers at mortgage foreclosure sales in ascertaining whether a court would be inclined to avoid the transfer.¹⁶ Increases in the amount raised at mortgage foreclosure sales would be the logical consequence of a system with less inherent risk.¹⁷ The resultant increase in proceeds would markedly decrease the potential for avoidance of the sale for failure to produce reasonably equivalent value.¹⁸

¹⁴ See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203-04 (5th Cir. 1980) (finding no decision where reasonably equivalent value deemed received when less than 70% of fair market value given); *Hernandez v. Canter (In re Hernandez)*, 150 B.R. 29, 30 (Bankr. S.D. Tex. 1993) (following *Durrett*); see also *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824 (7th Cir. 1988) (ruling that bankruptcy court must ultimately focus on fair market value as effected by foreclosure); *General Indus., Inc. v. Shea (In re General Indus., Inc.)*, 79 B.R. 124, 133 (Bankr. D. Mass. 1987) (stating price received very important in determining reasonably equivalent value).

¹⁵ See *Bundles*, 856 F.2d at 823 (noting that Congress should address any policy issues regarding definition of reasonably equivalent value); *First Fed. Sav. & Loan Ass'n v. Hulm (In re Hulm)*, 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984) (same); *Lindsay v. Beneficial Reins. Co. (In re Lindsay)*, 98 B.R. 983, 990 (Bankr. S.D. Cal. 1989) (urging Congress to provide feasible definition of reasonably equivalent value).

¹⁶ See *Abramoff v. Life Ins. Co. (In re Abramoff)*, 92 B.R. 698, 703 (Bankr. W.D. Tex. 1988) (noting that Bankruptcy Code's failure to define reasonably equivalent value leaves interpretation to courts); *Joing v. O & P Partnership (In re Joing)*, 82 B.R. 495, 498 (Bankr. D. Minn. 1987) (mem.) (noting that court cannot formulate black letter rule because of infinite permutations in which reasonably equivalent value may arise); *Fargo Builmore Motor Hotel Corp. v. Metropolitan Fed. Bank (In re Fargo Builmore Motor Hotel Corp.)*, 49 B.R. 782, 788 (Bankr. D.N.D. 1985) (asserting that phrase "reasonably equivalent value" has been interpreted to mean various things in different contexts). See generally BANKRUPTCY SERVICE, *supra* note 3, § 5D:45 (analyzing meaning of phrase "reasonably equivalent value").

¹⁷ See JAMES E. HIBDON, PRICE AND WELFARE THEORY 355-58 (1969) (claiming that unpredictability increases risk and results in lower prices); DANIEL ORR, PROPERTY MARKETS AND GOVERNMENT INTERVENTION 107-10 (1976) (pointing out that price reduction may decrease sales of "inferior goods"); see also Joseph J. Spengler, *Smith Verses Hobbes: Economy Verses Polity*, in THE WEALTH OF NATIONS 1776-1976 BICENTENNIAL ESSAYS 35, 40-43 (Fred R. Gleale ed., 1978) (stating that markets are self-regulating and less governmental restrictions will result in optimal pricing).

¹⁸ See, e.g., *National Envtl. Sys. v. Long Pond Realty Trust (In re National Envtl. Sys.)*, 111 B.R. 4, 9-12 (Bankr. D.N.H. 1989) (considering price among variety of factors in determining reasonably equivalent value); *Coleman v. Home Sav. Ass'n (In re Coleman)*, 21 B.R. 832, 834 (Bankr. S.D. Tex. 1982) (holding 28% of market value not reasonably equivalent value under *Durrett* approach); *Wickham v. United Am. Bank (In re Thompson)*, 18 B.R. 67, 70 (Bankr. E.D. Tenn. 1982) (finding 80% of fair market value to be reasonably equivalent value).

2. State Foreclosure Proceedings

Historically, the regulation of foreclosure proceedings has been a matter of state law.¹⁹ Permitting the states to elaborately dictate the steps constituting proper foreclosure presents a problem, however, in cases in which the Bankruptcy Code is implicated.²⁰ Absent an amendment to the Code, an unsuspecting mortgagee who complies with rigorous state foreclosure procedures still risks having the sale set aside by a bankruptcy court based on its interpretation of federal law.²¹ Thus, under the current system, compliance with state foreclosure requirements may be rendered irrelevant by the mechanism for determining reasonably equivalent value.²² Additionally, the present approaches for evaluating reasonably equivalent value rely primarily on hindsight.²³ This often leads to inequitable results because the partici-

¹⁹ See, e.g., ARIZ. REV. STAT. ANN. § 33-721 (1990) (indicating requirements for judicial mortgage foreclosure under Arizona state law); CAL. CIV. PROC. CODE § 580(d) (Deering Supp. 1994) (stating deficiency judgments not available to creditors following trustee sale under California law); CONN. GEN. STAT. ANN. § 49-14 (West Supp. 1993) (governing strict foreclosure in Connecticut); FLA. STAT. ANN. § 45.031 (West Supp. 1993) (governing judicial foreclosure as performed in Florida); see also *Butner v. United States*, 440 U.S. 48, 54 (1979) (noting that Congress generally allows states to determine property rights of bankrupt's estate); *In re Roach*, 824 F.2d 1370, 1379 (3d Cir. 1987) (stating that laws governing regulation of property have been traditionally left to states).

²⁰ See Robert E. Richards, Jr., Note, *Mortgage Foreclosure & Bankruptcy in Massachusetts: Is a Lawful State Foreclosure a Fraudulent Transfer?*, 25 NEW ENG. L. REV. 325 (1990). Mortgagees may foreclose by strictly complying with Massachusetts state laws only to have the sale avoided for failing to achieve reasonably equivalent value. *Id.* This result occurs even though Massachusetts uses the *Bundles* or case-by-case method of evaluating reasonably equivalent value. *Id.*

²¹ *Id.*

²² See, e.g., *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980). Courts using the *Durrett* method of measuring reasonably equivalent value will only examine the price received at the foreclosure sale to determine if it is equal to 70% of the property's fair market value. *Id.* In these jurisdictions, compliance with state foreclosure proceedings may be irrelevant for purposes of determining reasonably equivalent value because price received is the only factor examined. *Id.*

²³ See *supra* note 5. Excluding the *Madrid* approach, each method utilized in determining reasonably equivalent value uses some measure of hindsight. See *id.* For example, a court using the *Durrett* approach evaluates fair market value, a concept which is analyzed by retroactively examining factors which may be unknown to the parties at the time of the foreclosure sale. See *Durrett*, 621 F.2d at 203. Courts using a case-by-case or hybrid approach examine a multitude of factors which differ depending on the facts of each case. See *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824-25 (7th Cir. 1988); *Lindsay v. Beneficial Reins. Co. (In re Lindsay)*, 98 B.R. 983, 991 (Bankr. S.D. Cal. 1989). Practical application of each of these approaches results in a court retrospectively examining the facts and circumstances in each case to determine if the foreclosing seller achieved reasonably equivalent value. *Id.*

pants in a mortgage foreclosure sale do not have the benefit of future knowledge in evaluating the consideration offered at a mortgage foreclosure sale.²⁴ It is submitted that providing an amendment to the Federal Bankruptcy Code would alleviate these problems.²⁵

B. Proposed Amendment

The proposed amendment would apply only to real estate mortgage foreclosures²⁶ and would read as follows:

§ 548(e) Reasonably Equivalent Value

(1) For purposes of this section, reasonably equivalent value is given by a person acquiring an interest in an asset pursuant to a regularly-conducted, noncollusive, and commercially reasonable foreclosure sale, deed of trust, security agreement, or execution of a power of sale upon default under a mortgage.

(2) The price obtained shall not be considered by a court in determining whether the sale was conducted in a commercially reasonable manner. A sale approved in any judicial proceeding shall be conclusively presumed to be commercially reasonable. If a sale was not judicially approved, the court may consider the method, manner, time, place, terms of the sale, and other factors, including the following, in determining whether the sale was commercially reasonable:

(A) Whether notice of foreclosure was served on the debtor and any subordinate lienholder whose interest is recorded at least thirty days prior to the proposed sale or *lis pendens*, whichever occurs earlier, or whether such parties in fact had notice of the foregoing proceedings;

(B) The extent, frequency, and degree of public notice achieved by advertising in newspapers of general circulation;

By contrast, the *Madrid* test adopts an irrebuttable presumption that reasonably equivalent value is achieved if the foreclosing seller complies with state foreclosure procedure. See *Madrid v. Lawyer's Title Ins. Corp. (In re Madrid)*, 725 F.2d 1197, 1201-02 (9th Cir.), cert. denied, 469 U.S. 833 (1989). Thus, this approach is the only one where the mortgagee can be sure to achieve reasonably equivalent value by complying with state foreclosure law. *Id.*; see *supra* note 5 (describing four existing tests).

²⁴ See Zinman, *supra* note 6, at 597. Mortgagees do not have the benefit of knowing the future when prices are accepted at foreclosure sales. *Id.* Consequently, allowing judges to examine the propriety of a sale using 20/20 hindsight is especially dangerous. *Id.*

²⁵ See *supra* notes 19-24 and accompanying text (asserting amendment to Federal Bankruptcy Code is optimal way to resolve foregoing problems).

²⁶ Evaluation of the impact of the proposal on other types of foreclosure sales is beyond the scope of this Note.

(C) Whether a title report was provided for inspection to prospective purchasers prior to the foreclosure sale, and the date of the report, if so provided; and

(D) The length of the period from default to foreclosure of the debtor's equity of redemption, or expiration of any right of redemption under nonbankruptcy law.

(3) If the court determines that the sale was not commercially reasonable, the court may examine the price paid in relation to the liquidation value of the property at the time of the sale to determine whether reasonably equivalent value was received. The fact that a better price could have been obtained by a sale at a different time or in a different method pursuant to nonbankruptcy law is not, by itself, sufficient to establish that the sale price did not provide a reasonably equivalent value.

C. Objectives of Proposed Amendment

The purpose of promulgating this amendment to section 548 is to provide lenders and purchasers with a uniform method of determining when reasonably equivalent value is received at a mortgage foreclosure sale.²⁷ As discussed above, the risks inherent in the foreclosure process virtually ensure that real property foreclosure sales never achieve prices attainable in open, fair market sales.²⁸ Moreover, if the foreclosure sales involve commercial real

²⁷ See *Lindsay*, 98 B.R. at 989-90. Economic problems underlying the concept of reasonably equivalent value as defined in section 548 of Federal Bankruptcy Code are best resolved by Congress. *Id.* at 990; see *Bundles*, 856 F.2d at 823. The solution to defining the term is to amend section 548. See *First Fed. Sav. & Loan v. Hulm (In re Hulm)*, 738 F.2d 323, 327 (8th Cir.), *cert. denied*, 469 U.S. 990 (1984); see also *Madrid*, 725 F.2d at 1202.

Although the American Land & Title Association reacted to the *Durrett* decision by proposing an amendment to section 548, Congress instead chose to include mortgage foreclosures within the definition of a transfer under § 548. See 2 DUNAWAY, *supra* note 3, § 27B.04[2][b](iii). A statutory amendment was suggested as the optimal way to resolve the *Durrett* problem, but was rejected by Congress. Alden et al., *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the Durrett Problem*, 38 Bus. Law. 1605, 1610 (1983).

²⁸ See *Madrid*, 725 F.2d at 1202 (stating that economic value received at foreclosure sale is frequently less than fair market value); *Abramson v. Lakewood Bank & Trust Co. (In re Abramson)*, 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting) (property sold at foreclosure does not bring best price but will bring fair consideration), *cert. denied*, 454 U.S. 1164 (1982); *Alsop v. State (In re Alsop)*, 14 B.R. 982, 987 (Bankr. D. Alaska 1981) (failure to permit price received at foreclosure sale to significantly drop below market value would chill participation at sale); *Grand Trust Bank v. Castle Apartments Inc.*, 379 A.2d 1144, 1145 (Del. Super. Ct. 1977) (price received at foreclosure sale is based on percentage of fair market value); *American Mechanical Corp. v. Union Mach. Co. of Lynn*, 485 N.E.2d 680 (Mass. App. Ct. 1985) (amount received at mortgage foreclosure sale may be less than fair market value); *Murphy v.*

estate, fair market value is often difficult to predict because of the intrinsically complicated computation process.²⁹ Consequently, establishing a foreclosure process predicated on fair market value of property is unrealistic.³⁰ The proposed amendment, therefore, is designed to minimize the problems created by the absence of a definitive fair market value by attracting the greatest number of bidders to foreclosure sales.³¹ Since the resultant highly populated foreclosure sale is the best available substitute for an open market,³² compliance with the proposed statutory elements will generate a market that will achieve optimal prices for real estate under foreclosure while acting as a prophylactic, discouraging courts from avoiding such sales as fraudulent transfers under section 548 of the Bankruptcy Code.

II. JUSTIFICATION FOR STATUTORY ELEMENTS

Each of the proposed elements is advanced in light of a cost-benefit analysis.³³ In evaluating whether reasonably equivalent value has been achieved, the suggested amendment strives to shift the focus away from the monetary amount received at a fore-

Financial Dev. Corp., 495 A.2d 1245, 1252 (N.H. 1985) (price received at foreclosure sale may not be fair market value); *see also* Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 848-49 (1980) (citing several reasons for low mortgage foreclosure prices).

²⁹ *See* MICHAEL T. MADISON & ROBERT M. ZINMAN, *MODERN REAL ESTATE FINANCING: A TRANSACTIONAL APPROACH* 382-91 (1991). A number of methods may be used to calculate the value of commercial property. *See id.* at 382. The "income method" has become the primary method for valuing income producing real estate. *Id.* at 383-84. The income method usually consists of dividing the net income of the property by a selected capitalization rate, resulting in an estimate of value. *Id.* at 384. Since the net income capitalization figures are themselves estimates, the reliability of the result depends on the judgment used in selecting these factors. *Id.*

³⁰ *See id.* If there is a high degree of uncertainty in computing fair market value of commercial property, it follows that using a percentage of fair market value as a basis for foreclosure value would be equally inaccurate.

³¹ *See supra* notes 24, 27-28 and accompanying text; *infra* notes 52-63, 68, 77 and accompanying text.

³² *See supra* notes 24, 27-28 and accompanying text; *infra* notes 52-63, 68, 77 and accompanying text.

³³ *See* CHRISTINE AMMER & DEAN AMMER, *DICTIONARY OF BUSINESS AND ECONOMICS* 99 (1977). A cost-benefit analysis is "a systematic technique for . . . quantifying and comparing the expected cost and benefit of each alternative and choosing the option whose cost-benefit ratio is smallest." *Id.*; *see* Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1288 (1991). Effective governmental regulation requires the benefits of such restrictions to exceed the costs. *Id.*

closure sale and direct it towards the procedure governing the mortgage foreclosure sale.³⁴

In order to accomplish this goal, the statute is drafted in accordance with the general methodology proffered in the *Brown v. Vanguard Holding Corp.*³⁵ and *Lindsay v. Beneficial Reinsurance Co.*³⁶ line of cases.³⁷ Under this approach, a court examines whether a noncollusive foreclosure sale was properly conducted under state law.³⁸ If so, the totality of circumstances are evaluated, with particular emphasis on the enumerated statutory elements, to determine whether commercially reasonable steps were taken to achieve the optimal price at the foreclosure sale.³⁹ Only if the court determines that the foreclosure sale was not commercially reasonable, will it consider the value received at the foreclosure sale.⁴⁰

A. Procedural Considerations

The first element of the amendment utilizes language from the Uniform Fraudulent Transfer Act ("UFTA") definition of "reasonably equivalent value."⁴¹ The UFTA codifies prior judicial at-

³⁴ See *infra* notes 41-88 and accompanying text.

³⁵ 119 B.R. 413, 415 (Bankr. S.D.N.Y. 1990) (adopting *Lindsay* approach).

³⁶ 98 B.R. 983, 989-91 (Bankr. S.D. Cal. 1989) (setting forth new test for determining reasonably equivalent value under section 548 of Bankruptcy Code).

³⁷ See *Haider v. Haider* (*In re Haider*), 126 B.R. 796, 799 (Bankr. D. Mont. 1991) (utilizing *Lindsay* approach to ascertain reasonably equivalent value).

³⁸ See *Lindsay*, 98 B.R. at 991.

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ UNIFORM FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1984) [hereinafter UFTA]. Section 3(b) of the UFTA specifically defines reasonably equivalent value:

[A] person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale or execution or a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

Id.

Eighteen states have adopted the UFTA in some form. See, e.g., ARK. CODE. ANN. § 4-59-201 to -213 (Michie 1987); CAL. CIV. CODE § 3439.00-.12 (Deering 1984 Supp. 1993); FLA. STAT. ANN. § 726.101-.112 (West 1988); HAW. REV. STAT. § 651c-1 to -10 (1985); IDAHO CODE § 55-910 to -921 (1988); ME. REV. STAT. ANN. tit. 14, §§ 3571-3582 (West 1988 Supp. 1993); MINN. STAT. ANN. § 513.41-.51 (West 1990); NEV. REV. STAT. ANN. § 112.140-.250 (Michie 1993); N.H. REV. STAT. ANN. § 545-A:1 to -A:12 (1974 & Supp. 1993); N.D. CENT. CODE § 13-02.1-01 to -10 (1989); OKLA. STAT. ANN. tit. 24, §§ 112-123 (West 1987); OR. REV. STAT. § 95.200-.310 (1993); TEX. BUS. & COM. CODE ANN. § 24.001-.013 (West 1987); WASH. REV. CODE § 19.40.011-.901 (1989); W. VA. CODE § 40-1A-1 to -12 (1993); WIS. STAT. ANN. § 242.01-.13 (West 1988).

tempts to focus on the procedure of a foreclosure sale rather than on the price received.⁴² States adopting the UFTA can avoid the anomalous result of having a foreclosure sale comply with state foreclosure requirements, but avoided as a fraudulent transfer for failing to achieve reasonably equivalent value under federal law.⁴³ The codification of the UFTA definition of reasonably equivalent value in the Federal Bankruptcy Code would provide similar consistency.⁴⁴

The first subdivision of the UFTA also requires that the entire foreclosure sale be commercially reasonable.⁴⁵ This requirement was designed to grant the judiciary considerable flexibility in avoiding a sale when finding bad faith, unconscionability, or any other significant inequity.⁴⁶ Courts, however, should exercise restraint in vitiating sales that comply with either state law or a multitude of recommendations within the proposed statute.⁴⁷ The amendment's objective is to provide foreclosing sellers with guide-

⁴² See generally Robert M. Zinman, *Foreclosures as Fraudulent Transfers*, in REAL ESTATE & THE BANKRUPTCY CODE 1986, at 149 (PLI Real Estate Law and Practice Course Handbook Series No. N4-4467, 1986) (UFTA approach to determining reasonably equivalent value evolved from anti-Durrett case law).

⁴³ See generally Robert J. Rosenberg & Richard C. Bosse, Jr., *Avoidance of Preferences and Fraudulent Transfers: Uniform Fraudulent Transfer Act*, in ADVANCED BANKRUPTCY WORKSHOP 1992, at 269 (PLI Commercial Law and Practice Course Handbook Series No. A4-4359, 1992) (setting forth differences between avoidability of transactions under state and federal law).

⁴⁴ See *supra* notes 42-43 and accompanying text (UFTA definition of reasonably equivalent value promotes consistency).

⁴⁵ See U.C.C. § 9-504(1), 9-507(2) (1985). The proposed statute's commercially reasonable requirement was adopted from the U.C.C. method of evaluating whether a foreclosure sale may be avoided as a fraudulent transfer. See *id.* The relative success of this requirement under the U.C.C. foreshadows similar results if such a requirement were to be codified in the Federal Bankruptcy Code.

⁴⁶ See *Security Sav. Bank, SLA v. Tranchitella*, 592 A.2d 284, 287 (N.J. Super. Ct. App. Div. 1991). Commercial reasonableness should be viewed as a flexible concept based upon consideration of all relevant factors presented in each individual case. *Id.* A debtor may not waive the right to a commercially reasonable sale of collateral. *May v. The Women's Bank, N.A.*, 807 P.2d 1145, 1147 (Colo. 1991) (citing Bankruptcy Code). The U.C.C. uses a broad rule to test a party's disposition of collateral, placing the burden on the creditor to prove that every aspect of a sale was commercially reasonable, especially if the property sold is in a noncompetitive atmosphere. *Gulf Homes, Inc. v. Goubeaux*, 602 P.2d 810, 812 (Alaska 1979). See generally *Northern Commercial Co. v. Cobb*, 778 P.2d 205, 210 (Alaska 1989) (stating Alaska statute allows secured party to release repossessed collateral in public or private sale as long as requirement of commercial reasonableness is followed).

⁴⁷ See *infra* notes 52-55 and accompanying text.

lines for achieving reasonably equivalent value.⁴⁸ If the court abuses its power to avoid a sale for failing to be commercially reasonable, this eviscerates the statutory purpose. Flagrant avoidances will leave practitioners without any guidance.⁴⁹ Conversely, courts should not hesitate to exercise their power of avoidance to prevent sellers who, although complying with state law, are able to circumvent the purposes of the statute.⁵⁰

The commercial reasonableness requirement also permits courts to consider compliance with state foreclosure requirements in determining whether reasonably equivalent value has been received.⁵¹ This enables mortgagees to use compliance with state foreclosure proceedings as evidence of commercial reasonableness, to which a bankruptcy judge is compelled to give some weight.⁵²

⁴⁸ See *supra* notes 1-17 and accompanying text (describing anomaly which produces need for uniformity).

⁴⁹ See *C.I.T. Corp. v. Lee Pontiac, Inc.*, 513 F.2d 207, 209-10 (9th Cir. 1975). The term "commercially reasonable" is not specifically defined in the U.C.C. *Id.* at 209. The draftsmen deferred to case law for the development of its meaning. *Id.* Since the U.C.C. does not define the term, the determination that a sale is commercially reasonable depends on the facts and circumstances of each case. *Westgate State Bank v. Clark*, 642 P.2d 961, 969 (Kan. 1982). Thus, it is submitted that flagrant avoidance of foreclosure sales for failing to be commercially reasonable will not provide practitioners with any guidance and would be contrary to the purpose of the proposed statute.

⁵⁰ See *Cramton v. Altus Bank*, 596 So. 2d 902, 905-06 (Ala. 1992). Under the U.C.C., a disposition pursuant to a foreclosure sale which is approved in a judicial proceeding is conclusively presumed commercially reasonable. *Id.* This result is deemed equitable because all interested parties are given a chance to express their objections to the sale during the proceedings. *Id.*

⁵¹ Cf. *supra* note 5. In jurisdictions adopting the *Durrett* approach to reasonably equivalent value, compliance with state foreclosure proceedings will have no bearing on whether reasonably equivalent value was received. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980). The unique concern will be whether the 70% threshold has been met. *Id.* Additionally, although the other judicial approaches authorize courts to look at facts and circumstances surrounding the sale, state foreclosure procedures are not a factor in the determination. See *supra* note 5.

⁵² See *Connecticut Bank & Trust Co., N.A. v. Incendy*, 540 A.2d 32, 39 (Conn. 1988). Evidence showing that a sale of collateral was conducted in a commercially reasonable manner generally requires proof of such things as amount of advertising done; number of people contacted; normal commercial practices of disposing of collateral; length of time before disposition and sale; deterioration of the property; bids received; and price obtained. *Id.* Thus, the evaluation entails an examination of normal commercial practices. See *id.* Therefore, it is suggested that inclusion of the commercially reasonable requirement in the Federal Bankruptcy Code will correspondingly encourage examination of state foreclosure procedures to determine normal commercial practices in that state.

B. Price Considerations and Judicial Approval

The second part of the statute is significant because it eliminates price from primary consideration in gauging reasonably equivalent value.⁵³ The court will evaluate the consideration received only if it finds the procedure used by the mortgagee to be commercially unreasonable.⁵⁴

This provision also bestows an irrebuttable presumption of commercial reasonableness on foreclosure sales which have received judicial approval.⁵⁵ This presumption expedites the process and promotes judicial economy by discouraging plaintiffs from challenging such sales.⁵⁶ Sometimes, however, court approval is not expressly granted at the commencement of the sale, as in the nonjudicial foreclosure states.⁵⁷ For these situations, the amendment provides several factors a court may consider in determining whether the sale is commercially reasonable.⁵⁸ An explanation of each of these factors follows.

1. Notice of Foreclosure

Subsection 2(A) of the proposed amendment authorizes judicial scrutiny of a mortgagee's efforts to provide notice to those of

⁵³ A number of courts currently relegate price to a secondary consideration in determining reasonably equivalent value. *See, e.g.,* Littleton v. Littleton (*In re Littleton*), 888 F.2d 90, 93 (11th Cir. 1989) (holding percentage rule to be useful not exclusive guideline for determination of reasonably equivalent value); Bundles v. Baker (*In re Bundles*), 856 F.2d 815, 824-25 (7th Cir. 1988) (refusing to allow irrebuttable presumption of reasonably equivalent value based on price); McKeever v. McClelland (*In re McKeever*), 132 B.R. 996, 1008 (N.D. Ill. 1991) (disallowing conclusive presumption value given at foreclosure sale was reasonably equivalent).

⁵⁴ *See supra* notes 36-41 and accompanying text (outlining various approaches to reasonably equivalent value as related to commercial reasonableness).

⁵⁵ *See* Cramton v. Altus Bank, 596 So. 2d 902, 905 (Ala. 1992) ("Where the disposition of the collateral has been approved in a judicial proceeding, the disposition is conclusively deemed to be commercially reasonable."). Bestowing an irrebuttable presumption on a judicially approved foreclosure sale will have the result of forcing those opposing the sale to raise their objections at the judicial proceeding. *Id.*; *see supra* notes 49-53.

⁵⁶ *See infra* notes 57-89 and accompanying text.

⁵⁷ *See* MADISON & ZINMAN, *supra* note 29, at 1003-04, 1009 (discussing two primary methods of foreclosures: judicial and power of sale foreclosure).

⁵⁸ *See supra* notes 55-56 and accompanying text; *infra* notes 59-63, 67-68 and accompanying text. Subsection 2 of the proposed amendment was modeled in part after U.C.C. § 9-504(3), which states in pertinent part: "[E]very aspect of the disposition including the method, manner, time, place and terms of the must be commercially reasonable." U.C.C. § 9-504(3) (1985). These considerations, however, are not intended to be exclusive.

record who have an interest in the property.⁵⁹ The dissemination of information can be accomplished at minimal cost to the seller.⁶⁰ Moreover, such judicial examination is likely to encourage diligent disclosure.⁶¹ Additionally, people with interests junior to the foreclosing mortgagee, who usually have a significant stake in the outcome of the foreclosure sale, will be appraised.⁶² Consequently, these parties are likely to act as watchdogs, overseeing the transaction and bringing procedural deficiencies to the attention of the court.⁶³ This threat of multiple scrutiny provides additional assurance that the foreclosure process is properly conducted.⁶⁴ As a result, subsection 2(A) serves to increase the probability of a higher price being received at the foreclosure sale.⁶⁵

⁵⁹ Numerous state foreclosure proceedings require notice to those with an interest in the foreclosed property. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-809(B) (1990) (requiring notice of foreclosure sale by mail to those with recorded interest); MD. REAL. PROP. CODE ANN. § 7-1052(1) (1992) (mandating written notice by certified mail to record owner); MICH. ADMIN. CODE r. 600.3208 (1977) (allowing owner to receive notice by publication similar to potential purchasers at foreclosure sale); TEX. ADMIN. CODE tit. Property, § 51.0002(b)(3) (1993) (stating holder of debt is to receive notice of foreclosure sale by certified mail).

⁶⁰ *See supra* note 59 and accompanying text. Maximum cost in most cases amounts to the price of a certified or registered letter to all persons who have a recorded interest in the property. *Id.* In the aggregate, this cost is minimal compared to the amount at stake in a mortgage foreclosure sale.

⁶¹ A state foreclosure law mandating specific notification to those with an interest in the property will probably already satisfy the disclosure requirements. *See supra* note 59; *infra* note 68. If a state does not have such a requirement of specific notification, examining the reasonableness of notification will encourage a more diligent disclosure by foreclosing mortgagees. *See supra* note 59.

⁶² *See* *Breeding Motor Freight Lines, Inc. v. Reconstruction Fin. Corp.*, 172 F.2d 416, 422 (10th Cir.) (function of notice is to attract interested bidders to mortgage foreclosure sale and inform public), *cert. denied*, 338 U.S. 814 (1949); *Cromer v. DeJarnette*, 51 S.E.2d 201, 204-07 (1949) (Miller, J., dissenting) (purpose of proper foreclosure notification is to disseminate information about sale to all interested potential bidders).

⁶³ *See Cromer*, 51 S.E.2d at 204-05 (Miller, J., dissenting). Whether notice is proper "is to be determined and measured by consideration of the local custom . . . relative to the manner in which similar sales are advertised, the results obtained, and any other circumstances tending to establish the ultimate effectiveness of the [notice-giver's] actions." *Id.*

⁶⁴ Moreover, it is submitted that creditors at significant risk, such as those who have a lien junior to the foreclosing mortgagee, are likely to scrutinize the process and alert the court if any material departure from proper procedure occurs.

⁶⁵ It is submitted that mortgagees who are fearful that deviation from the proper foreclosure process will be reported to the court are more likely to comply with the appropriate state foreclosure procedures.

2. Informing the Public

Another factor to be considered in determining commercial reasonableness is the extent to which the public is informed of the foreclosure sale.⁶⁶ Subsection 2(B) mandates publication of notice in a newspaper of general circulation.⁶⁷ Currently, numerous states utilizing a power-of-sale mortgage foreclosure process have enacted similar provisions to enhance notification to potential bidders.⁶⁸ This publication requirement will result in a minimal cost increase to the mortgagee, since many states already require some form of advertisement.⁶⁹ Comparatively, the benefit to potential buyers will be significant, since clearly delineated notice will enable buyers to readily locate the time and place of the auction in which they are interested.⁷⁰

Additionally, suggesting that courts examine the extent of public notice achieved by a mortgagee's advertisement will encourage foreclosing sellers to publicize in a manner more easily understood by laypersons.⁷¹ Foreclosing sellers may effectively accomplish this task by including a common description of the

⁶⁶ See *infra* notes 67-68, 71-74 (discussing public notification).

⁶⁷ Specifications as to which newspapers are considered of general circulation may be established legislatively by the states or judicially by the court presiding over a given case. See *infra* note 68. Even if the tenets are not unequivocally set forth in the proposed statute, once a state defines the concept either legislatively or judicially, it is submitted that subsequent cases in the jurisdiction will be provided with the necessary illustrative guidance.

⁶⁸ See Fishman, *supra* note 11, at 48-49 (terms of sale may be established by court decrees or state statutes and rules, or both); see, e.g., ARIZ. REV. STAT. ANN. § 33-808(1)(a) (1970 & Supp. 1993) (requiring notice published in newspaper of general circulation at least weekly for four consecutive weeks prior to sale); FLA. STAT. ch. 45.031(1) (1993) (requiring publication of sale for two weeks in publication of general circulation); MICH. ADMIN. CODE r. 600.3208 (1987) (notice of foreclosure sale mandated by publication weekly for four consecutive weeks); TEX. ADMIN. CODE tit. Property, § 51.002(b)(1), (2) (1993) (notice given to general public by combination of posting on courthouse door and filing with county clerk).

Additionally, states adopting judicial foreclosure will normally require court approval of the method utilized to satisfy the sale. See, e.g., CONN. GEN. STAT. § 49-25 (1993) (permitting court to specify nature and extent of advertising in judicial foreclosure sale); ILL. REV. STAT. ch. 110, para. 15-1503 (1992) (allowing court to specify nature of advertising requirements).

⁶⁹ See *supra* note 68 and accompanying text; *infra* note 74 and accompanying text.

⁷⁰ See *supra* notes 59-63, 68 and accompanying text; *infra* notes 73, 76-78 and accompanying text.

⁷¹ It is suggested that foreclosing sellers who are aware that courts are scrutinizing the notification given to potential buyers are more likely to clearly disclose the sale to obtain judicial approval.

property, such as a street address, in the notice.⁷² This simple, yet specific type of notice would cultivate public interest in bidding on the foreclosed property.⁷³ Furthermore, providing such a description would enable even the unsophisticated public to easily ascertain which property is being sold and would facilitate further investigation of the sale.⁷⁴

3. Provision of Title Report

A third factor to aid the court in determining whether the standard of commercial reasonableness was met is set forth in subsection 2(C),⁷⁵ which would authorize court investigation into whether a title report was provided to prospective purchasers at the mortgage foreclosure sale. A comprehensive title report is indispensable to a potential buyer because it reveals many of the risks inherent in the property.⁷⁶ Such disclosure will result in less buyer uncertainty, thereby providing higher bids and a greater likelihood that reasonably equivalent value will be received in a commercially reasonable sale.⁷⁷ Moreover, in most situations, providing a title report will result in minimal incremental cost to

⁷² See ARIZ. REV. STAT. ANN. § 33-808(4)(C)(1) (1990 & Supp. 1993). Arizona currently requires that a common description accompany the legal description in publications giving notice of the sale. See *id.*

⁷³ See 59 C.J.S. *Mortgages* § 724(c)(2), at 1318 (1949) (identifying property with "common certainty" usually suffices) (footnote omitted).

⁷⁴ See Wesley J. Liebler, *A Property Rights Approach to Judicial Decision Making*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 153, 155 (James A. Dorn & Henry G. Manne eds., 1987). When the costs of a transaction are high, courts should base their decisions on behavior that the parties to the transaction themselves would have likely undertaken. See *id.* In the context of mortgage foreclosure advertising, providing a common description of the property would help to achieve the most efficient result. See *id.* at 154-55.

⁷⁵ See *supra* text accompanying notes 26-27.

⁷⁶ See Susan R. Boyle, *Title Insurer Has No Duty to Report Cloud*, MASS. L. WKLY., May 18, 1992, at 1 (title insurer not liable for failure to disclose encumbrance without contractual obligation to uncover and report title defects); Richard M. Frome & Thomas D. Kearns, *There Oughta Be a Law*, N.Y. L.J., Dec. 31, 1991, at 2 (tenants can request representation in certain situations from landlords, but absent title report, defects may only be disclosed upon foreclosure sale). Title insurance is also necessary to protect against defects disclosed by title report. See Tom Kelly, *Unkempt Yard May be Tip-Off to Crooks*, SEATTLE TIMES, May 3, 1992, at G1 (indicating that parties to private real estate purchase should obtain title report and title insurance so that risks can be avoided). See generally Scott E. Mollen, *Realty Law Digest*, N.Y. L.J., Mar. 18, 1992, at 4 (stating that although title report did not disclose filing statement, no protection provided because title insurance was not obtained).

⁷⁷ See MADISON & ZINMAN, *supra* note 29, at 240-54 (explaining benefits and risks disclosed by title report through use of hypothetical example).

mortgagees since many are either required by state law to perform title searches⁷⁸ or opt to do so for their own pecuniary benefit.⁷⁹

4. Efficiency of Foreclosure Process

Another important consideration is the efficiency of the foreclosure process.⁸⁰ While some states provide an expedient mechanism for disposing of foreclosure property, this expediency may result in an inequitable deprivation of a mortgagor's rights.⁸¹ Subsection 2(D) was codified to encourage a court to consider the length of time given to a mortgagor to exercise the equity of redemption.⁸² This represents a last chance for the mortgagor, or other parties whose interest would be relinquished at the foreclosure, to pay the lender after acceleration of the mortgage payments but before foreclosure.⁸³ In addition to equitable redemp-

If foreclosing sellers provide prospective purchasers with updated title reports, the buyer will be informed of all risks that title reports could disclose as of the date of the document, barring errors.

⁷⁸ See ILL. ANN. STAT. ch. 735, para. 15-1506(f)(12) (Smith-Hurd 1992) (requiring that title insurance be provided for purchaser at foreclosure sale).

⁷⁹ Title reports and insurance are strongly suggested before foreclosure to ascertain all parties whose interests will be foreclosed and to whom notice of the foreclosure proceeding must be given. 2 DUNAWAY, *supra* note 3, § 27B.04[1](a). Mortgagees electing to obtain updated title reports and insurance must carefully examine the exceptions to their policies. See *generally id.* § 27B.02[2][d]-[e].

⁸⁰ See *infra* notes 82-85 and accompanying text (discussing pros and cons of timely foreclosure process).

⁸¹ See, e.g., TEX. PROP. CODE. ANN. § 51.002 (West Supp. 1994). See *generally* Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure Process—A Proposal to Reconcile the Procedures Mandated By State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code*, 43 SW. L.J. 1061, 1065 (1990) (noting that Texas mortgage foreclosure proceeding is both simple and efficient). But see Purnell v. Follett, 555 S.W.2d 761, 763 (Tex. Ct. App. 1977) (criticizing Texas state mortgage foreclosure proceeding as unduly harsh remedy). For a description of the modern Texas foreclosure proceeding, see Gover & West, *supra*, at 1065-66.

⁸² See, e.g., *In re Smail*, 129 B.R. 676 (Bankr. M.D. Fla. 1991) (demonstrating that once equity of redemption period expires, mortgagor has no other remedy); see also *Bankruptcy: Chapter 13*, 58 U.S.L.W. 2465, (Feb. 20, 1990) (explaining that policy behind equitable redemption is question of how much time debtors should be given to save their property); *Foreclosure*, 52 U.S.L.W. 2171 (Sept. 27, 1983) (stating Washington law enables debtor to redeem within year of foreclosure sale); Washburn, *supra* note 28, at 929 (asserting that equity of redemption is of particular importance when property's value exceeds amount owed).

⁸³ 1 DUNAWAY, *supra* note 3, § 15.01[2]. The equity of redemption enables the mortgagor to retain the property by paying the default amount and other costs prior to foreclosure. See *id.* § 15.06[1]. Some states have codified this right or guarantee a minimum time in which to exercise it. See, e.g., CAL. CIV. CODE § 2924(c) (West 1993) (requiring three month period from filing notice of default to notice of sale); GA. CODE

tion, many states permit redemption for a specified period after the foreclosure.⁸⁴ The mortgagor's ability to exercise this statutory right varies from thirty days to three years.⁸⁵ An expanded length of time for a mortgagor to exercise the equity of redemption or statutory redemption rights increases the probability that the sale was conducted in a commercially reasonable manner;⁸⁶ however, an expanded duration of this right subjects the foreclosing seller to financial risks.⁸⁷ Consequently, courts considering this provision must exercise caution in evaluating the costs and benefits to those in the foreclosure process.⁸⁸

ANN. § 67-115 (Supp. 1993) (terminating equity of redemption after ten years of mortgagee's last recognition of redemption right if borrower permits lender to take possession of property); IDAHO CODE § 45-1506(12) (Supp. 1993) (permitting cure for 115 days after notice of default or until foreclosure decree); IND. CODE § 32-8-16-1 sec. 1(a) (West Supp. 1993) (decree of sale under judicial foreclosure delayed for three, six, or twelve months after filing of complaint, depending on date of mortgage execution).

⁸⁴ 1 DUNAWAY, *supra* note 3, § 15.01[1],[3]. Statutory redemption, which involves payment of the sale price rather than the default amount, exists in approximately half of the states. *Id.* § 15.01[3].

⁸⁵ 1 DUNAWAY, *supra* note 3, § 15.04; *see, e.g.*, ALASKA STAT. §§ 09.35.220(2), 09.35.250 (1983) (enabling debtor and lenders with possibility of losing interest in property through foreclosure to redeem prior to sale or within 12 months thereafter); ARIZ. REV. STAT. ANN. §§ 12-1281, 12-1282 (1992) (judgment debtor or successors may redeem property up to 30 days after foreclosure sale, subject to limited exceptions); ARK. CODE ANN. § 18-49-106 (Michie 1987) (property sold under order of decree can be redeemed up to one year from time of sale); COLO. REV. STAT. ANN. § 38-39-102 (1993) (borrower or any other person liable for deficiency has 75-day redemption period following sale); IDAHO CODE § 11-402 (1990) (allowing redemption within one year of foreclosure if land is more than twenty acres or within six months if land is twenty acres or less).

⁸⁶ *See* Washburn, *supra* note 28, at 930 (reasoning that longer redemption periods provide borrowers with additional time to finance repurchase).

⁸⁷ The lender bears the risk that the property will decline in value prior to sale, yielding insufficient proceeds to satisfy the underlying debt. 1 DUNAWAY, *supra* note 3, § 6.02, at 6-2. The lender may incur costs in maintaining the property prior to foreclosure in an attempt to preserve the value. *See id.* Additionally, in states permitting redemption after the foreclosure sale, the sale price will be diminished because the purchaser bears the risk that if the mortgagor exercises the right of redemption he will have to relinquish the property. *See id.* § 15.01[3].

⁸⁸ *See* Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 490 (1991) (analyzing economic efficiency of mortgagor protection laws). *See generally* 27 AM. JUR. 2D *Equity* § 192 (1966) (demonstrating courts may consider expense and complexity of proceedings when deciding whether to avoid multifarious suit); 75A AM. JUR. 2D *Trial* § 612 (1991) (stating arguments to jury based on economic theory or factors may be valid).

C. Price Analysis of Commercially Unreasonable Foreclosure Sales

Section 3, the last portion of the statute, authorizes scrutiny of the price received at a foreclosure sale only if a court previously concluded that the sale was not conducted in a commercially reasonable manner.⁸⁹ In this instance, the foreclosing seller is stripped of the protection afforded by a properly conducted sale⁹⁰ as the court is determining whether to avoid the transfer.⁹¹ However, in evaluating the price received, it is imperative that the consideration be measured pursuant to the foreclosure market⁹² since the appraisal in a fair market does not adequately contemplate the risks inherent in the foreclosure process.⁹³ The possibility of obtaining a higher price, therefore, should not preclude a

⁸⁹ See *supra* notes 38-40 and accompanying text. For cases discussing commercial reasonableness, see *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 439 (2d Cir. 1987) (interpreting commercial reasonableness as requiring creditor to dispose of collateral in accordance with prevailing trade practices among responsible businesses involved in similar business); *Suffield Bank v. LaRoche*, 752 F. Supp. 54, 61 (D.R.I. 1990) (evaluating procedural aspects of sale in applying commercial reasonableness requirement to disposition of property); *Topeka Datsun Motor Co. v. Stratton*, 736 P.2d 82, 86 (Kan. Ct. App. 1987) (stating "commercial reasonableness is an umbrella term which encompasses all aspects of sale"); *Huntington Nat'l Bank v. Elkins*, 559 N.E.2d 456, 458 (Ohio 1990) (price alone not determinative of commercial reasonableness); *Mount Vernon Dodge, Inc. v. Seattle First Nat'l Bank*, 570 P.2d 702, 711 (Wash. 1977) (stating commercial reasonableness focuses on methodology of sale, not price).

⁹⁰ See *supra* notes 34-37 and accompanying text.

⁹¹ See *Lindsay*, 98 B.R. at 991. If the foreclosure sale was not commercially reasonable, then the seller is in the vulnerable position of permitting the price received to be considered in determining reasonably equivalent value. See *id.*

⁹² See, e.g., *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980) (holding that 57.7% of fair market value not reasonably equivalent); *Berge v. Sweet (In re Berge)*, 33 B.R. 642, 650 (Bankr. W.D. Wis. 1983) (stating that 68.5% of fair market value not reasonably equivalent where sale lacked procedural protections); *Moore v. Gilmore (In re Gilmore)*, 31 B.R. 615, 617-18 (Bankr. E.D. Wash. 1983) (noting that while 63% to 76% of market value may not have been reasonably equivalent value, fair price alone not decisive if fair procedures employed); *Richard v. Tempest (In re Richard)*, 26 B.R. 560, 563 (Bankr. D.R.I. 1983) (holding that 1% of fair market value not reasonably equivalent). See generally Ehrlich, *supra* note 6, at 958-62 (providing reasons for differences between foreclosure value and fair market value).

⁹³ See Walcott, *supra* note 10, at 409-10 (explaining policy behind difference in fair market value and foreclosure price); Zinman, *supra* note 6, at 594-601 (describing reasons for difference between price of foreclosed commercial property and residential property, and why *Durrett* approach is inadequate to measure both); cf. *In re Ristich*, 57 B.R. 568, 577 (Bankr. N.D. Ill. 1986) (creating irrebuttable presumption that when person unrelated to debtor purchases property at foreclosure sale, price received was reasonably equivalent).

finding that reasonably equivalent value was received;⁹⁴ rather, the figure must be evaluated in light of the circumstances of each case.⁹⁵

D. Interest of All Parties in Obtaining Higher Price at the Foreclosure Sale

All of the parties involved in a foreclosure proceeding are best served by eliciting the optimal price at the sale.⁹⁶ The lower the consideration received at the sale, the greater the probability that the sale will be avoided by a court for failing to achieve reasonably equivalent value. Mortgagees are often the highest bidders and will often purchase the property themselves for approximately the amount of the outstanding encumbrance.⁹⁷ Consequently, the property must be further processed, improved, or resold before the lenders can recover.⁹⁸ Most prudent lenders are not in the real estate business and would prefer to realize their investment at the foreclosure sale rather than at a subsequent sale.⁹⁹ Additionally,

⁹⁴ See U.C.C. § 9-507(2) (1985). "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." *Id.*; see *MacDonald v. First Interstate Credit Alliance, Inc.* (*In re MacDonald*), 100 B.R. 714, 717-18 (Bankr. D. Del. 1989) (fact that better sale price was available not grounds to set aside foreclosure sale for commercial unreasonableness); *McMillian v. Bank South, N.A.*, 373 S.E.2d 61, 63 (Ga. Ct. App. 1988) (availability of better price alone does not warrant avoidance of sale); *Villella Enter., Inc. v. Young*, 766 P.2d 293, 296-97 (N.M. 1988) (noting that while price is relevant, merely claiming that price is too low does not rebut presumption of commercial reasonableness); *State Nat'l Bank v. Academia Inc.*, 802 S.W.2d 282, 289 (Tex. Ct. App. 1990) (adequacy of price, though not dispositive, is "key component" in assessing commercial reasonableness).

⁹⁵ See also *MacDonald*, 100 B.R. at 718 (examining facts of particular sale to determine whether commercially reasonable).

⁹⁶ See *supra* notes 13-14 and accompanying text (discussing cyclical problem that results if insufficient consideration is received at mortgage foreclosure sale resulting in judicial avoidance of sale).

⁹⁷ See 2 DUNAWAY, *supra* note 3, § 27B.04[2][b][i] (mortgagees often purchase foreclosed property at foreclosure sale); Ehrlich, *supra* note 6, at 961 (mortgagees often acquire foreclosed property for approximately amount of outstanding encumbrance); Robert K. Lifton, *Real Estate in Trouble: Lender's Remedies Need an Overhaul*, 31 BUS. LAW. 1927, 1937 (1976) (indicating that mortgagee is only bidder in approximately 99% of public foreclosure sales).

⁹⁸ See *infra* notes 104-09 and accompanying text (indicating problems lender faces by reacquiring foreclosed property at mortgage foreclosure sale, in particular, costs of resale such as advertising).

⁹⁹ See 4 DUNAWAY, *supra* note 3, TX 6.09 (demonstrating necessity of mortgagee to resell property purchased at foreclosure sale to obtain ultimate return); see also Steven Wechsler, *Through the Looking Glass: Foreclosure By Sale as De Facto Strict*

foreclosures in which the mortgagee is the final purchaser are likely to be the subject of heightened scrutiny because the process appears to be a procedural formality without economic substance.¹⁰⁰ Owners of foreclosed property also have a vested interest in maximizing the proceeds of a foreclosure sale. A higher price reduces the likelihood of a deficiency judgment and augments the possibility of a surplus, which would be returned to the original owner.¹⁰¹

III. A PRACTITIONER'S GUIDE TO ACHIEVING REASONABLY EQUIVALENT VALUE

A. *Suggestions for Realizing Reasonably Equivalent Value*

Absent a statutory amendment to section 548 of the Federal Bankruptcy Code defining reasonably equivalent value in the context of mortgage foreclosures, practitioners desperately need a framework to assist them in achieving this ethereal goal.¹⁰² The following discussion includes a series of suggestions an attorney may use to bolster his claim in attempting to convince a court that reasonably equivalent value was received. The practitioner may view the proposals as a type of self-insurance system.¹⁰³ Admit-

Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 CORNELL L. REV. 850, 875 (1985) (mortgagees repurchased property in 91 of 118 foreclosure sales necessitating resale before mortgagees could ultimately recapture their investment).

¹⁰⁰ See Washburn, *supra* note 28, at 887 (noting higher scrutiny given to mortgage-purchaser).

¹⁰¹ See *In re Francis*, 42 B.R. 760, 762 (Bankr. S.D. Mo. 1984) (noting debtors' desire to obtain maximum price at foreclosure sale to reduce amount of deficiency judgment); *Court Won't Review if Ch. 7 Debtor Can Redeem Realty for 'Stripped Down' Value*, 57 Bankr. Rep. (BNA) No. 21, at 864 (Nov. 25, 1991) (stating purpose of statute to protect Wisconsin debtors from deficiency judgments); *Foreclosure Sale is Set Aside for Mistake, Inadequate Price*; *Crossland Mort. Corp. v. Frankel*, *Supreme Court, Justice Lefkowitz*, N.Y. L.J., Oct. 21, 1992, at 21, 27 (foreclosure sales will be vacated where inequitable); *Real Property Law Surreptitious Lease Changes*; *Northern Metropolitan Residential Health Care Facility Inc. v. Ledri Realty Assoc. Inc.*, N.Y. L.J., Apr. 21, 1992, at 21, 23 (property sold subject to lease in bankruptcy proceeding increases deficiency judgment); *Tight FHA Underwriting Stds. and Credit Analyses are Planned to Curb Abuses*, *Daily Rep. for Exec. (BNA)* No. 66, at A-1 (Apr. 7, 1986) (HUD aggressively pursues deficiency judgments against program abusers).

¹⁰² See *supra* notes 1-8 and accompanying text (explaining why practitioners need some guidance until adequate legislative remedy is provided).

¹⁰³ See GEORGE GILDER, *WEALTH AND POVERTY* 113 (1981) (asserting that people obtain insurance to remove risk from unknown future). *But see* *Syracuse Eng'g Co. v. Haight*, 110 F.2d 468, 471 (2d Cir. 1940) (noting that self-insurance is no insurance at all); *In re New York State Rys.*, 16 F. Supp. 717, 724 (N.D.N.Y. 1936) (determining that debtor was self-insurer by saving money himself); BLACK'S LAW DICTIONARY 724

tedly, costs will be increased as additional steps are taken, but it is submitted that the risk of avoidance of the foreclosure sale will correspondingly be reduced.¹⁰⁴

One important factor for practitioners to consider is advertising.¹⁰⁵ Promotion of the sale increases the number of prospective buyers,¹⁰⁶ thereby heightening the probability that reasonably equivalent value will be received. The effects of advertising can be enhanced by increasing the frequency of publication beyond the requirements of state law.¹⁰⁷ Additionally, the client may consider advertising the sale in real estate sections of local newspapers and other magazines specializing in the particular type of real estate being marketed. Since the cost of advertising may out-

(6th ed. 1990) (defining self-insurance plan as plan where insured periodically places aside money in fund to cover potential future losses).

¹⁰⁴ See Mark N. Polebaum et al., *Completed Foreclosure Preferences and Fraudulent Transfers*, C784 ALI-ABA 411 (1992). A foreclosing seller is more likely to protect himself by following a more diligent procedure. *Id.*

¹⁰⁵ See, e.g., Britta Gordon, *Sale of High-End Homes Sluggish in Recent Months*, PORTLAND BUS. J., Oct. 5, 1992, § 1, at 19 (finding high cost of realty advertising squeezes medium-sized brokers out of market); Adrienne Hardman, *Under the Gavel*, FIN. WORLD, Sept. 29, 1992, at 28 (noting that auctioneers charge per-property entry fee to cover cost of advertising); Rose Ragsdale, *Realtors Will Publish Weekly Advertiser*, ALASKA J. COM., July 20, 1992, at 1 (discussing special publication to advertise real estate to combat rising costs); *Real Estate, Higher Appraisal Threshold Needed for Commercial Real Estate, ABA Claims*, Daily Rep. for Exec. (BNA) 129 (July 6, 1992) (noting commercial real estate costs have risen sharply last year); *Regulation Raising Commercial Appraisal Costs—ABA*, Reuters Ltd., July 6, 1992, at 1 (finding rise in real estate appraisal costs in past year by average of 48%); *After Merger, Former Competitors Gird for New Rivals in Residential Real Estate*, PORTLAND BUS. J., June 29, 1992, § 1, at 5 (discussing how two of Portland's largest residential real estate firms joined forces, in part to cut advertising costs).

¹⁰⁶ See Jamie Beckett, *Advertisers Use Recession to Their Advantage*, S.F. CHRON., Jan. 27, 1992, at B3 (discussing advertisers' creation of new approaches to increase sales in recession); Jamie Beckett, *Madison Avenue to Run Ad Asking President for Plug*, S.F. CHRON., Jan. 23, 1992, at B1 (advertising offers numerous economic benefits such as stimulating sales, reducing consumer pricing, and increasing product innovation); Mark Larson, *Media Nervously View Advertising Revenues*, SACRAMENTO BUS. J., Jan. 6, 1992, at 10 (advertisers can encourage advertising sales by lowering prices); Phil Rabin & Carolyn Myles, *Coast Guard Deal Afloat Finalists Ready to Protest*, WASH. TIMES, Dec. 23, 1992, at C3 (finding advertising beneficial when consumers are optimistic); see also Timothy McQuiston, *Where Do Banks Go From Here?*, 20 VT. BUS. MAG. 22 (1992) (explaining banks benefit from strong promotion and advertising that generate clientele at foreclosure sales); Steven Wolcott, *New Network Offers Services for Residential Real Estate Brokers in KC*, 10 KAN. CITY BUS. J. (1992) (small real estate agents syndicating to take advantage of advertising).

¹⁰⁷ See *supra* notes 105-06 (more frequent advertising increases probability that interested bidders are adequately informed of sale).

weigh its benefits, however, a case-by-case or portfolio-by-portfolio analysis will be required.¹⁰⁸

The foreclosing seller should also consider soliciting the assistance and cooperation of the debtor.¹⁰⁹ Since each party has a vested interest in maximizing the consideration received at the foreclosure sale, both parties may be amenable to an agreement allowing prospective purchasers to examine the property.¹¹⁰ Inspection will decrease the unknown variables inherent in the foreclosure process. This risk reduction should serve to increase the price buyers are willing to pay.¹¹¹

Another suggestion, also of insignificant expense to foreclosing mortgagees, is to increase the number of days of advance notice by one week beyond the minimum prescribed by state law.¹¹² Extending the notice requirement will demonstrate to a court scrutinizing the foreclosure process that the mortgagee clearly provided the community with sufficient time to learn of and make relevant inquiries into the sale.

Mortgagees should also assess the feasibility of obtaining an appraisal of the foreclosed property.¹¹³ The property should be

¹⁰⁸ See generally Peter F. Koslowski, *The Ethics of Capitalism*, in PHILOSOPHICAL AND ECONOMIC FOUNDATIONS OF CAPITALISM 33, 35 (Svetozar Pejovich ed., 1983) (explaining that people in all economies evaluate alternatives in striving to maximize profit).

¹⁰⁹ See Daniel J. Isenberg, *Tangible Personal Property (Owner Financing)*, 339 PLI/COMM 81 (1984) (providing suggestions for attorneys seeking to protect foreclosure sales involving personal property from avoidance under section 548). These recommendations will also be useful for practitioners attempting to accomplish the same goal involving mortgage foreclosure sales. See Mark N. Polebaum et al., *Completed Foreclosures, Preferences, and Fraudulent Transfers*, C784 ALI-ABA 411 (containing suggestions specifically designed to assist counsel in preventing mortgage foreclosure sale from being avoided).

¹¹⁰ See *supra* notes 96-101 and accompanying text (stating each party's interest in receiving best price).

¹¹¹ See *supra* note 17 and accompanying text (proposing that removing risk from foreclosure process should serve to increase price received at foreclosure sale).

¹¹² The author recognizes that extending the notification requirement by one week is arbitrary. However, the mortgagee must choose a time that provides adequate notice while minimizing the cost of the extended notification. It is suggested that one week would suffice.

¹¹³ See generally *Appraisals: The Cost of a Faulty Appraisal*, 22 REAL EST. L. REP. 7 (1992) (explaining nightmare scenario to frighten residential appraisers and their insurance carriers); James M. Pedowitz, *The Creditor's Rights Exclusion: Belt and Suspenders*, in CURRENT DEVELOPMENTS IN TITLE INSURANCE 1992, at 13 (PLI Real Estate Law and Practice Course Handbook Series No. N4-4568, 1992) (explaining foreclosure sale would not be attacked as fraudulent if proper underwriting practices, including appraisals, were utilized); Polebaum et al., *supra* note 109, at 411 (discussing importance of appraisal).

evaluated in light of the hazards of the foreclosure market.¹¹⁴ Although a foreclosure price may be difficult to predict, the appraisal may be used as a benchmark in establishing that reasonably equivalent value was received.¹¹⁵ Additionally, the lender may use the appraisal as evidence of the property's value as determined by an independent party not involved in the transaction.¹¹⁶

Furthermore, mortgagees should avoid unreasonable postponement of the sale¹¹⁷ since any delay may diminish interest cultivated by prior advertisement.¹¹⁸ If unavoidable impediments arise, re-advertisement is invaluable to maintain interest and ed-

¹¹⁴ See generally James W. Hubbel, *Defending Lender Liability Suits*, 19 COLO. LAW. 2409 (1990) (providing series of indicators which should serve to warn lender's counsel of potential problems, including substantial deficiency bid unsupported by appraisal); Richard W. Havel et al., *Materials on Foreclosure Litigation*, C740 ALI-ABA 97 (1992) (discussing mortgage foreclosure appraisal statutes).

¹¹⁵ See Noel W. Nellis et al., *Issues and Strategies For Dealing With a Real Estate Workout*, R175 ALI-ABA, BANKR. 139 (1992) (stating lender should obtain independent appraisal which will carry more weight in convincing court of foreclosure value). See generally 2 DUNAWAY, *supra* note 3, § 25.03. In jurisdictions following the *Durrett* approach, the lender should be sure to have the appraisal made prior to the foreclosure sale and bid at least 70% of the property's fair market value. *Id.* The lender's appraisal should be evaluated to determine whether foreclosure is prudent in light of the extensive time and expense involved in the foreclosure of real estate. *Id.*

¹¹⁶ See generally 2 DUNAWAY, *supra* note 3, § 27D.01-.08 (indicating sales where foreclosing mortgagees reacquired property were more likely to be scrutinized).

Fraud and incompetence in the appraisal profession run rampant and were the subject of a 1987 congressional subcommittee hearing. *Id.* § 27D.01. One of the reasons why appraisers are able to avoid litigation is that most do not have deep pockets. *Id.* § 27D.04[1]. Numerous techniques of misrepresentation in the appraisal profession can be mentioned as criteria for fraud. *Id.* § 27D.05. One of the problems with the contemporary appraisal profession is inadequate supervision and training. *Id.* § 27D.07.

¹¹⁷ See Paul E. Roberts, *Construction Loan Documentation, Structure and Procedure for Troubled Times*, C788 ALI-ABA 43 (1992) (stating delays inherent in foreclosures make cumbersome procedure more awkward and expensive); Myron C. Weinstein, *Sheriffs Need Help With Foreclosure Crisis*, N.J. L.J., Jan 18, 1993, at C3 (finding delays increase foreclosure costs to lender and undue delays hurt everyone). See generally Paul Feldman, *Pair Who Offered Phony Legal Aid Get Jail Terms*, L.A. TIMES, Aug. 21, 1985, at 2 (discussing fraudulent offer by people to halt or delay foreclosure and eviction); Wendy Swallow, *Bankruptcy Used to Stall Foreclosures*, WASH. POST, Mar. 17, 1984, at E1 (noting changes in Bankruptcy Code allow debtors to delay foreclosure process through bankruptcy).

¹¹⁸ See *infra* notes 119-20 and accompanying text (claiming any delay in process should be accompanied by new advertising); see also Jo Anne Bradner, Note, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 EMORY L.J. 971, 997-1003 (1987) (explaining costs in mortgage foreclosure system are largely function of delays). See generally George M. Platt, *The Dracula Mortgage; Creature of the Omitted Junior Lienholder*, 67 OR. L. REV. 287 (1988) (discussing problems of defective foreclosure).

ucate potential buyers.¹¹⁹ Foreclosing sellers should also employ all other reasonable steps necessary to cultivate competitive bidding and increase the number of interested buyers at the sale, provided that the cost of utilizing such techniques are outweighed by the benefits of increasing the public awareness of the sale.¹²⁰

Finally, mortgagees should obtain a foreclosure price that is at least seventy percent of fair market value.¹²¹ Obtaining a price in excess of this threshold will reduce court scrutiny in virtually all jurisdictions.¹²²

B. *Ramifications of Jurisdiction*

Another important variable for practitioner evaluation is the approach currently utilized in their jurisdiction for determining reasonably equivalent value.¹²³ A discussion of the methods most commonly employed follows.

1. The *Durrett* Approach

Under the approach adopted by the Fifth Circuit in *Durrett v. National Insurance Co.*, reasonably equivalent value is obtained

¹¹⁹ See *supra* notes 105-08 and accompanying text (discussing advertising). See generally Robin Phelan et al., "Dance With the One That Brought You" Unless it was a Failed Savings and Loan Then You Have to do the Lambada With the Resolution Trust Corporation, in ADVANCED BANKRUPTCY WORKSHOP 1991, at 317, 371 (PLI Commercial Law and Practice Course Handbook Series No. A4-4325, 1991) (explaining attempts by borrowers that will fail to delay foreclosure sales).

¹²⁰ See Eugene H. Berman & James H. Fierberg, *Durrett: The Problem and Suggestions for its Solution*, 90 COM. L.J. 162, 169 (1989) (noting modest investment of time, money, and effort may protect avoidance of foreclosure sales).

¹²¹ See *supra* note 5 (discussing how foreclosure price in excess of 70% of fair market value minimizes court scrutiny of foreclosure process).

¹²² See *supra* note 5. In jurisdictions adopting the *Durrett* approach, failure to achieve a foreclosure sale price of at least 70% of the property's fair market value will usually preclude the sale from being considered as having achieved reasonably equivalent value. See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980). In a *Madrid* jurisdiction, although price received at a noncollusive mortgage foreclosure sale is irrebuttably presumed to be reasonably equivalent value, sales achieving at least 70% of fair market value will receive a more superficial examination by a court. *Madrid v. Lawyer's Title Ins. Corp. (In re Madrid)*, 725 F.2d 1197, 1201-02 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984). In states where the *Bundles* or *Lindsay* approaches are followed, price is considered one of a number of factors; thus, achieving a price in excess of 70% of fair market value will be advantageous. See *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824 (7th Cir. 1988); *Lindsay*, 98 B.R. at 991.

¹²³ See *infra* note 124-41 and accompanying text (discussing ramifications of different jurisdictional approaches to determining reasonably equivalent value and resulting action to be undertaken by practitioner).

when at least seventy percent of the property's fair market value has been received at the foreclosure sale.¹²⁴ In a *Durrett* jurisdiction, attorneys must consider the type of property being sold.¹²⁵ If the foreclosed property is residential real estate, evaluating the fair market value of the property is relatively straightforward.¹²⁶ The safest approach is to ensure that the price received exceeds seventy percent of the property's fair market value;¹²⁷ however, the seventy percent *Durrett* rule is merely a benchmark, not a requirement.¹²⁸ Consequently, if seventy percent is not realized, a colorable argument can be made that since each piece of land is unique, the risks affiliated with each are different.¹²⁹ Therefore,

¹²⁴ *Durrett*, 621 F.2d at 205.

¹²⁵ See Zinman, *supra* note 6, at 594-601 (urging distinction between commercial and residential property in analyzing *Durrett* problem); Michael L. Cook et al., *Fraudulent Transfers*, in BASICS OF BANKRUPTCY AND REORGANIZATION 1992, at 9 (PLI Commercial Law and Practice Course Handbook Series No. A4-4391, 1992) (stating mortgage foreclosure sales were first subjected to reasonably equivalent value requirement of section 548 under *Durrett* and progeny); J. Thomas Dunn, Jr., *Representing a Secured Lender*, in UNDERSTANDING BUSINESS BANKRUPTCY 1992: HOW TO HANDLE EVERYDAY PROBLEMS, at 55 (PLI Commercial Law and Practice Course Handbook Series No. A-4393, 1992) (noting *Durrett* first case to hold noncollusive foreclosure sale subject to § 548 reasonably equivalent value requirement); Chaim J. Fortgang & Thomas Moers Meyer, *Valuation in Bankruptcy*, in FORMULATING REORGANIZATION PLANS: STRATEGIES FOR SUCCESS, at 9, 9 (PLI Commercial Law Practice Course Handbook Series No. A4-4374, 1992) (*Sandy Ride* case antithesis of *Durrett*).

¹²⁶ See Zinman, *supra* note 6, at 599 (finding generally easy to estimate fair market value of residential real property).

¹²⁷ See, e.g., *Abramson v. Lakewood Bank and Trust Co. (In re Abramson)*, 647 F.2d 547 (5th Cir. 1981) (affirming *Durrett* holding), *cert. denied*, 454 U.S. 1164 (1982); *Barrett v. Commonwealth Federal Sav. and Loan Ass'n (In re Barrett)*, 113 B.R. 175, 183 (Bankr. E.D. Pa. 1990) (using *Durrett* approach, 69.5% of fair market value not reasonably equivalent value under Federal Bankruptcy Code), *rev'd*, 118 B.R. 255 (Bankr. E.D. Pa.), *aff'd*, 439 F.2d 20 (2d Cir. 1991); *Aspedon v. Labbee (In re Aspedon)*, 73 B.R. 538, 540 (Bankr. S.D. Iowa 1987) (applying *Durrett* 70% benchmark to determine reasonably equivalent value); *Fargo Builmore Motor Hotel Corp. v. Metropolitan Fed. Bank (In re Fargo Builmore Motor Hotel Corp.)*, 49 B.R. 782, 789 (Bankr. D.N.D. 1985) (payment of 70% of fair market value considered reasonably equivalent value under *Durrett* test); *Willis v. Borg-Warner (In re Willis)*, 48 B.R. 295, 301 (Bankr. S.D. Tex. 1985) (applying *Durrett* test to determine reasonably equivalent value); *Coleman v. Home Sav. Ass'n (In re Coleman)*, 21 B.R. 832, 834 (Bankr. S.D. Tex. 1982) (concluding 28% of fair market value not reasonably equivalent value); *Wicksham v. United Am. Bank, (In re Thompson)*, 18 B.R. 67, 70 (Bankr. E.D. Tenn. 1982) (finding 80.8% of fair market value reasonably equivalent value under *Durrett* test).

¹²⁸ See *Durrett*, 621 F.2d at 205 (suggesting 70% benchmark, not mandating it).

¹²⁹ Land is considered a unique asset as evidenced by a court's willingness to grant specific performance in contracts involving land disputes. See, e.g., *Canton v. Monaco Partnership*, 753 P.2d 158, 160 (Ariz. Ct. App. 1987) (failing to award specific

undertaking any of the foregoing suggestions may help reduce the possibility of a fraudulent transfer.¹³⁰

Conversely, the fair market value of commercial property is difficult to predict because of the complexity and uncertainty involved in the requisite actuarial computations.¹³¹ Accordingly, predicting seventy percent of an amorphous figure will be equally difficult.¹³² Again, however, it is submitted that undertaking an increased number of recommendations will heighten the probability that reasonably equivalent value was received.

2. The *Madrid* Approach

The Ninth Circuit's approach in *Madrid v. Lawyer's Title Insurance Corp.* creates an irrebuttable presumption of reasonably equivalent value if the price was received at a noncollusive and regularly-conducted foreclosure sale.¹³³ Thus, to establish that reasonably equivalent value was received, practitioners in *Madrid* jurisdictions need only show that they have strictly complied with state foreclosure proceedings.¹³⁴

3. The *Bundles* Approach

Courts adopting the Seventh Circuit's approach in *Bundles v. Baker* examine all of the facts and circumstances surrounding a

performance to condominium owner but stating remedy is common in land disputes); *Wolliamsky v. Miller*, 661 P.2d 1145, 1147 (Ariz. Ct. App. 1983) (stating specific performance ordinarily available for sale of real estate because land unique); *C. Robert Nattress & Assocs. v. Cidco*, 229 Cal. Rptr. 33, 37 (Cal. Dist. Ct. App. 1986) (noting specific performance usually given for breach of contract involving real property because land considered unique); *1010 Potomac Assocs. v. Grocery Mfr.*, 485 A.2d 199 (D.C. 1984) (finding legal remedy of specific performance warranted where land involved because all land unique); see also *Whig Syndicate, Inc. v. Keyes*, 836 P.2d 1283, 1287 (Okla. 1992) (noting specific performance used in land disputes because land is unique asset); *GRW Enters., Inc. v. Davis*, 797 S.W.2d 606 (Tenn. Ct. App. 1990) (granting specific performance because land unique).

¹³⁰ See *supra* notes 105-22 and accompanying text.

¹³¹ See *supra* note 29 and accompanying text (explaining computation behind valuation of commercial real estate).

¹³² See *supra* note 29 and accompanying text.

¹³³ See 21 B.R. 424, 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984).

¹³⁴ See *Cardinal Enters. v. Far West Fed. Bank*, 68 B.R. 460, 462 (Bankr. 9th Cir. 1986) (following *Madrid* approach to determining reasonably equivalent value), *aff'd*, 844 F.2d 791 (9th Cir. 1988); *Strauser v. Veterans Admin.*, 40 B.R. 868, 870 (N.D. Ohio 1984) (holding properly conducted foreclosure sale is conclusively reasonably equivalent value); *Reinboldt v. Travelers Ins. Co.*, 39 B.R. 677 (Bankr. D. Minn.) (following *Madrid* approach to reasonably equivalent value), *aff'd*, 59 B.R. 678 (Bankr. D. Minn. 1984).

foreclosure sale to determine whether reasonably equivalent value was received.¹³⁵ The suggestions previously outlined will probably be most useful in this type of jurisdiction.¹³⁶ A court examining the foreclosing seller's aggregate conduct will be increasingly likely to conclude that reasonably equivalent value was received the greater the number of suggestions utilized.¹³⁷

4. The Hybrid Approach

Finally, a strong case can also be made for using the foregoing recommendations in states adopting a hybrid approach to determining reasonably equivalent value.¹³⁸ An example of a hybrid approach is set forth in the *Lindsay* decision.¹³⁹ Courts following this methodology require strict compliance with state foreclosure proceedings, followed by an examination of the totality of the circumstances involved in each particular case.¹⁴⁰ Since the jurisdictions employing this technique consider a multitude of factors, an increase in the number of suggestions undertaken will reduce the possibility that a court will avoid the foreclosure sale.¹⁴¹

IV. REASONABLY EQUIVALENT VALUE IN THE CONTEXT OF MORTGAGE FORECLOSURES: A CONTEMPORARY ISSUE

The problem of defining reasonably equivalent value in the context of mortgage foreclosures has existed since the *Durrett* decision in 1980.¹⁴² Recently, however, in *In re BFP*, the United

¹³⁵ See *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824 (7th Cir. 1988).

¹³⁶ See *supra* notes 105-22 and accompanying text.

¹³⁷ See *Barrett v. Commonwealth Fed. Sav. and Loan Ass'n*, 939 F.2d 20, 22 (3d Cir. 1991) (utilizing case-by-case approach to determine reasonably equivalent value); *Morris Communications NC, Inc. v. Ashley Communications*, 914 F.2d 458, 466-67 (4th Cir. 1990) (adopting *Bundles* case-by-case approach); *Lavender and McKeever v. BMJ Co. (In re Lavender and McKeever)*, 132 B.R. 996, 1012 (Bankr. N.D. Ill. 1991) (examining facts and circumstances of each particular case to determine reasonably equivalent value); *DeVito v. DeVito (In re DeVito)*, 111 B.R. 529, 532 (Bankr. W.D. Pa. 1990) (adopting *Bundles* approach).

¹³⁸ *Lindsay*, 98 B.R. at 991.

¹³⁹ See *supra* notes 36-40 and accompanying text.

¹⁴⁰ See *supra* note 35, 37 (setting forth recent cases adopting *Lindsay* approach).

¹⁴¹ See *supra* note 105-22 and accompanying text.

¹⁴² See *Durrett*, 621 F.2d at 201 (analyzing reasonably equivalent value in mortgage foreclosure context); Brief of the American Counsel of Life Insurance and American College of Real Estate Attorneys as *amici curiae* in Support of Respondents, at 8-10, *In re BFP*, 974 F.2d 1144 (9th Cir. 1992) (indicating no case prior to *Durrett* ever invalidated regularly-conducted, noncollusive foreclosure sale and *Durrett* contradicted more than 400 years of fraudulent conveyance law), *cert. granted*, *In re BFP*, 113 S. Ct. 2411 (1993) [hereinafter American Counsel of Life Ins. and ACREL Brief].

States Supreme Court granted certiorari to address the issue of whether reasonably equivalent value is received as a matter of law pursuant to a regularly-conducted, noncollusive foreclosure sale.¹⁴³ If this question is answered in the affirmative, the Court will provide foreclosing sellers with the means to protect their mortgage foreclosure sales from being avoided for failure to achieve reasonably equivalent value.¹⁴⁴ However, regardless of the Supreme Court's decision, the suggestions provided by the proposed amendment will be useful.¹⁴⁵

But see Brief of Frank Allen, Lavander and Elnora McKeever, The Consumer Education and Protective Association, The Consumer's League of New Jersey and Chapter 13 Trustee Edward Sparkman as *amici curiae* in support of petitioner, at 13-27, *In re BFP*, 974 F.2d at 1144 [hereinafter Consumer Educ. and Protective Ass'n Brief].

¹⁴³ See *In re BFP*, 974 F.2d at 1144; American Counsel of Life Ins. and ACREL Brief, *supra* note 142, at i (indicating question presented); Consumer Educ. and Protective Ass'n Brief, *supra* note 142, at 13-27 (arguing noncollusive, regularly-conducted mortgage foreclosure sale not permissible method of achieving reasonably equivalent value); see also *BFP v. Resolution Trust Corp.* 92-1370, NAT'L L.J., Aug. 23, 1993, at S22 (discussing noncollusive, regularly-conducted mortgage foreclosure sale as permissible method for achieving reasonably equivalent value under Federal Bankruptcy Code); *BFP v. Imperial Sav. & Loan* 92-1370, NAT'L L.J., June 7, 1993, at 38 (noting decision in 9th Circuit would be granted *certiorari*); *Bankruptcy 92-1370*, *BFP v. Resolution Trust Corp.*, 61 U.S.L.W. 3783 (May 25, 1993) (commenting on court's approach to determining reasonably equivalent value in *BFP*); 92-1370, *BFP v. Imperial Sav. & Loan Ass'n*, 61 U.S.L.W. 3695 (Apr. 6, 1993) (summarizing holding of *BFP*); Marc A. Levinson, *Consensus of Value is Elusive; Foreclosure Sale*, NAT'L L.J., Nov. 30, 1992, at 33 (indicating discrepancy among approaches to determining reasonably equivalent value under Federal Bankruptcy Code); Barry L. Zaretsky, *The Outer Limits of Fraudulent Conveyance Law*, N.Y. L.J., Nov. 19, 1992, at 3 (discussing failure to achieve reasonably equivalent value as method of avoiding foreclosure sale); 9th Circuit, NAT'L L.J., Nov. 16, 1992 (indicating *BFP* was upheld); *One Bankruptcy Case Awaits Argument As U.S. Supreme Court Begins New Term*, Bankr. Rep. (BNA) (Oct. 4, 1993) (indicating *BFP* granted *certiorari*).

¹⁴⁴ See *In re BFP*, 974 F.2d at 1148 (explaining that noncollusive, reasonably-conducted mortgage foreclosure sale is optimal method of defining reasonably equivalent value under Federal Bankruptcy Code to preserve federal and state goals); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985) (citing *Madrid*) (indicating foreclosure sale under § 548(a)(2)(A) should be consistent with state law); *In re Madrid*, 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984) (adopting noncollusive, reasonably-conducted mortgage foreclosure sale as permissible method of achieving reasonably equivalent value). *But see* *Bundles v. Baker (In re Bundles)*, 856 F.2d 815 (7th Cir. 1988) (adopting case-by-case analysis of facts and circumstances to determine if reasonably equivalent value was achieved); *Durrett*, 621 F.2d at 201 (noting if 70% of fair market value achieved, foreclosure sale cannot be avoided for failing to obtain reasonably equivalent value under § 548(a)(2)(A)). See generally Gover & West, *supra* note 81, at 1062 (explaining *Durrett* rule and its adoption by courts).

¹⁴⁵ See *infra* notes 146-47 and accompanying text.

If the Supreme Court rejects a noncollusive, regularly-conducted mortgage foreclosure sale as a presumptive method of achieving reasonably equivalent value, this area of the law will continue to be extremely nebulous, and a statutory solution will remain necessary to guide practitioners in satisfying this requirement.¹⁴⁶ If the Supreme Court affirms a noncollusive, regularly-conducted foreclosure sale as a method of achieving reasonably equivalent value, the proposed amendment will be beneficial to the revision committee if they decide to amend section 548.¹⁴⁷

CONCLUSION

The term "reasonably equivalent value," as currently utilized in section 548 of the Federal Bankruptcy Code, is a virtually impenetrable jungle. Radically inconsistent outcomes arise depending on the jurisdiction of the sale. Consequently, foreclosing parties desperately need some guidance in satisfying this vague standard. This Note has suggested an amendment to section 548 that provides a clear and precise definition of reasonably equivalent value for purposes of mortgage foreclosure. The proposed amendment encourages courts to balance all of the relevant factors in light of the conflicting needs of mortgagees, mortgagors, and potential purchasers at foreclosure sales. The result would be much needed certainty in an area of the law filled with ambiguity.

Until an amendment is enacted, however, attorneys must understand how to reduce the probability that a court will avoid a foreclosure sale as a fraudulent conveyance under section 548. The articulated suggestions provide practitioners with a variety of techniques aimed at satisfying the current statutory standard. Decisions to undertake any or all of the recommendations will be highly fact contingent and will require careful consideration of the ramifications in light of costs, benefits, and jurisdiction. Despite the problems besetting this amorphous area of law, it is hoped that the suggested methodology will assist practitioners confronted with the difficulty of interpreting reasonably equivalent value under section 548 of the Bankruptcy Code.

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¹⁴⁶ See notes 1-18 and accompanying text (demonstrating murkiness of reasonably equivalent value requirement).

¹⁴⁷ See notes 27-95 and accompanying text (explaining merits of proposed statute and reasons why such provisions are useful).

